NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION II

No. CA08-4

	Opinion Delivered October 22, 2008
KAREN BLANTON, APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, NINTH DIVISION, [NO. PDE2005-1919]
V.	
DAISY JACKSON, APPELLEE	HONORABLE MARY MCGOWAN, JUDGE
	AFFIRMED IN PART; REVERSED AND REMANDED IN PART

SAM BIRD, Judge

This is a will contest. On October 28, 2005, James Richard Oliver died with a will, leaving all of his property to his neighbor, appellee Daisy Jackson, and leaving nothing to his five grown children. His children filed a petition to set aside the will proffered by Ms. Jackson and to remove her as personal representative of their father's estate. After a hearing, the trial court denied the petition. Appellant Karen Blanton, one of Mr. Oliver's children, has appealed the trial court's decision. She brings two points on appeal: first, the trial court erred in finding that the will complied with the requisite statutory formalities for executing a valid will; and, second, the trial court erred in failing to require Ms. Jackson to overcome the rebuttable presumption of undue influence and lack of mental capacity. We reverse the trial court's decision and remand for further proceedings consistent with this opinion.

Mr. Oliver, a sixty-five-year-old man in poor health, died at St. Vincent's Hospital on

October 28, 2005. The will proffered by Ms. Jackson for probate was executed on October 27, 2005, while Mr. Oliver was in the critical care unit at St. Vincent's. Appellant and her siblings (hereinafter referred to as "the contestants") filed a petition to set aside this will; the court held a trial on the matter on September 18 and 19, 2006, and concluded the trial on January 30, 2007. On September 10, 2007, the trial court entered an order, finding that the statutory requirements for execution of a valid will had been met. The court stated specifically that "all witnesses testified that the decedent knew what he was doing" and that the witnesses testified "the decedent knew he was signing the will which they witnessed." The court then held that the burden shifted to the contestants of the will to prove that Ms. Jackson exerted "improper and inordinate influence" over Mr. Oliver. While the court noted that there was "a close relationship" between Ms. Jackson and Mr. Oliver, it determined that undue influence was not proven and it denied the petition to set aside the will.

We review probate proceedings de novo, but we will not reverse the trial court's findings of fact unless they are clearly erroneous. *Looney v. Estate of Wade*, 310 Ark. 708, 839 S.W.2d 531 (1992). When reviewing the proceedings, we give due regard to the opportunity and superior position of the trial judge to determine the credibility of the witnesses. *Bell v. Hutchins*, 100 Ark. App. 308, 311, ___ S.W.3d ___, ___ (2007).

I. Statutory Requirements

For her first point on appeal, appellant contends that the trial court's finding that the will was valid was clearly erroneous because the will was not signed in the presence of two or more attesting witnesses; Mr. Oliver did not request the attesting witnesses to sign; and Mr.

Oliver did not declare to the attesting witnesses that the instrument was his will. Arkansas law requires a will to be signed by the testator and at least two witnesses. Ark. Code Ann. § 28-25-103 (Repl. 2004). The statute provides that, in addition to signing the will, the testator must "declare to the attesting witnesses that the instrument is his or her will" and the signature must be executed "in the presence of" the witnesses. Ark. Code Ann. § 28-25-103(b). Finally, the attesting witnesses "must sign at the request and in the presence of the testator." Ark. Code Ann. § 28-25-103(c).

The two witnesses to the will were Corey Pilson and Mary Helenese, both nurses at St. Vincent's, and their signatures were acknowledged by notary public Angela Brewer. Ms. Helenese, a critical care nurse, testified that she was walking down the hallway when Mr. Oliver's nurse, Corey Pilson, asked her if she would witness a living will and a power of attorney. She said that Mr. Pilson never mentioned a last will and testament and that she had never, to her knowledge, been a witness to a patient's last will and testament. She said that she walked into the room and signed the document. She said that she was not told anything about the document and that, when she signed what she thought was a living will and power of attorney, Mr. Oliver's signature was already on the document. She stated that she did not see him sign it.

The other witness, Mr. Pilson, testified that he thought Ms. Jackson brought the will to the hospital room. He recalled trying to accommodate Ms. Jackson's wishes to get the documents, the will and a healthcare proxy, signed. On cross-examination, he testified that he was "pretty sure" Ms. Helenese was in the room with him and the notary when Mr.

Oliver signed the will. However, on redirect he indicated that his notes from that day reflected that he and the notary were in the room and not Ms. Helenese.

Angela Brewer testified that she worked as an office manager in the business office at St. Vincent's and that as part of her job she notarized patient documents. She had no specific memory of notarizing Mr. Oliver's will, but it was in her log. She said that her usual practice was to make sure the patient knew what he was about to sign before he signed it and to have all of the witnesses in the room at one time. She also testified that she asked the witnesses for identification.

Ms. Jackson testified that Mr. Oliver asked her to get papers from his house and she did. She testified that she did not know one of the documents she brought to him was a will until he executed it at the hospital. She testified that she told Mr. Pilson that Mr. Oliver needed witnesses in order to sign some papers and that Mr. Pilson obtained the witnesses. She then testified that she, her son, Mr. Pilson, Ms. Helenese, and Ms. Brewer were in the room when Mr. Oliver signed his will. She also testified that someone—she thought Ms. Brewer—asked him if he knew what he was signing.

First, with respect to appellant's argument that the will was not signed in the presence of two or more attesting witnesses, Corey Pilson testified that he was in the room when Mr. Oliver signed the will and that he was "pretty sure" Ms. Helenese was also in the room. Moreover, although Ms. Helenese testified that the document was already signed when she witnessed it, Ms. Jackson testified that Mr. Pilson and Ms. Helenese were in the room when Mr. Oliver signed the will. In probate proceedings, we give due regard to the opportunity

and superior position of the trial judge to determine the credibility of the witnesses. *Bell,* 100 Ark. App. at 311, ___ S.W.3d at ___. Giving due deference to the trial court's position, we hold that its finding on this issue is not clearly erroneous.

Second, the supreme court has held that substantial compliance is sufficient for the statutory requirements that the testator request the attesting witnesses to sign and that he declare to the attesting witnesses that the instrument was his will. *See, e.g.*, *Faith v. Singleton*, 286 Ark. 403, 692 S.W.2d 239 (1985); and *Hanel v. Springle*, 237 Ark. 356, 372 S.W.2d 822 (1963). In this case, Ms. Jackson testified that both witnesses were in the room when Mr. Oliver signed his will and that Ms. Brewer asked him questions about the will, including whether he knew what he was signing. Ms. Brewer testified that it was her usual practice to have all of the witnesses in the room together and that she made sure that the person signing understood what he was signing. The court held in *Faith* that where the testatrix understood that she was making a testamentary disposition of her property, this was communicated to the witnesses, and the witnesses understood, the requirement of publication was satisfied. 286 Ark. at 407, 692 S.W.2d at 243. Further, while there is no evidence that Mr. Oliver expressly "requested" the witnesses to sign the will, there was testimony that he asked Ms. Jackson to obtain a notary and a nurse in order to get "his papers signed," that, in Mr. Oliver's presence, Ms. Jackson asked Mr. Pilson to be a witness and to help him obtain a notary, and that both witnesses signed in Mr. Oliver's presence. We hold that this constitutes substantial compliance and that the trial court's determination that this was a valid will was not clearly erroneous.

II. Shifting of the Burden of Proof

We now turn to appellant's second point on appeal. Appellant contends that the trial court clearly erred in not requiring Ms. Jackson, the will's proponent, to overcome beyond a reasonable doubt the rebuttable presumption of undue influence and lack of mental capacity because Ms. Jackson procured the will and was in a confidential relationship with Mr. Oliver.

The general rule in a will contest is that the party contesting the validity of the will has the burden of proving by a preponderance of the evidence that the testator lacked mental capacity at the time the will was executed or that the testator acted under undue influence. *Looney*, 310 Ark. at 710, 839 S.W.2d at 533. However, there are certain circumstances that will cause the burden of proving undue influence to shift to the proponents of a will. One example of this is where a beneficiary procures the will. Procurement of a will requires actual drafting of the will for the testator or planning the testator's will and causing him to execute it. *Bell,* 100 Ark. App. at 311, ___ S.W.3d at ___. Procurement shifts the burden to the proponent of the will to show beyond a reasonable doubt that the will was not the result of undue influence and that the testator had the mental capacity to make the will. *Bell*, 100 Ark. App. at 311, ___ S.W.3d at ___. This court has also held that, when a conservator is the principal beneficiary of his guardian's will, the burden shifts to the proponent/conservator to overcome by a preponderance of the evidence the rebuttable presumption of undue influence. *Birch v. Coleman*, 15 Ark. App. 215, 691 S.W.2d 875 (1985). Finally, and of particular importance in this case, we have held that the existence of a confidential relationship between a primary beneficiary of a will and the testator gives rise to a rebuttable presumption of undue

influence. *Medlock v. Mitchell*, 95 Ark. App. 132, 234 S.W.3d 901 (2006); *see also Union Nat'l Bank v. Leigh*, 256 Ark. 531, 509 S.W.2d 539 (1974) (holding widow's confidential relationship with her husband put the burden on her to overcome a rebuttable presumption of undue influence).

Therefore, our review on this issue is two-fold. First, we must determine whether Ms. Jackson procured the will, giving rise to a rebuttable presumption of undue influence and lack of mental capacity and shifting the burden to her to show beyond a reasonable doubt that the will was not the result of undue influence and that Mr. Oliver had the mental capacity to make the will. Appellant points to the following testimony to support her position. Ms. Jackson testified that she brought the instrument to the hospital while Mr. Oliver was in a weakened state. Ms. Jackson admitted that she and her son were both present when Mr. Oliver executed the will. Moreover, Ms. Jackson and her son were the only people who knew that a will existed, and she took possession of the will after it was signed. Further, appellant points to testimony by her mother, Mr. Oliver's ex-wife, that Mr. Oliver would not have used the language written in the will and would never have left his children out. She also points to her brother Terry Oliver's testimony that Mr. Oliver thought Duran Ford was an attorney and that he had helped Mr. Oliver in the past with a legal problem. Appellant also points to the testimony of Mr. Oliver's niece, Freddie Oliver, who spoke with Mr. Oliver every day, that Mr. Oliver believed Duran Ford was an attorney. Freddie also testified that she had never seen Mr. Oliver type and that he was not in the physical condition necessary to type. She testified that Mr. Oliver told her most of the details of his financial affairs but

that he never mentioned a will. Finally, Freddie testified that Mr. Oliver loaned money to Ms. Jackson and that he bought a refrigerator for Ms. Jackson when hers went out.

Procurement of a will requires actual drafting of the will for the testator or planning the testator's will and causing him to execute it. *Bell*, 100 Ark. App. at 311, ___ S.W.3d at ___. While it is not clear precisely how Mr. Oliver's will was drafted, there was no evidence that Ms. Jackson either drafted the will or planned the will and caused Mr. Oliver to execute it. Thus, we hold that the circuit court did not clearly err in finding that Ms. Jackson did not procure the will.

However, that does not end our inquiry. We must now determine whether there existed a confidential relationship between Ms. Jackson and Mr. Oliver giving rise to a rebuttable presumption of undue influence. If a confidential relationship existed, Ms. Jackson, as a beneficiary and proponent of the will—whose undue influence is presumed as a matter of law—was required to prove by a preponderance of the evidence that she did not take advantage of the relationship such that the will was the product of this undue influence and not the result of Mr. Oliver's own volition. *Medlock*, 95 Ark. App. at 135, 234 S.W.3d at 904; *see also Birch*, 15 Ark. App. at 221, 691 S.W.2d at 878.

Turning to the evidence in this case, we note that there was abundant testimony regarding the confidential nature of the relationship between Ms. Jackson and Mr. Oliver. Ms. Jackson lived several houses down from Mr. Oliver and had a key to his house. She was listed as Mr. Oliver's wife on his life insurance policy, of which she was the beneficiary, and Mr. Oliver also paid for a life insurance policy on Ms. Jackson's daughter, of which Ms.

Jackson was the beneficiary. In addition, Mr. Oliver executed a quitclaim deed giving a one-half ownership interest in his house to Ms. Jackson a month before he died.

Ms. Jackson was also referred to as Mr. Oliver's "caregiver" and "girlfriend" in Baptist Health hospital records from June 2005 and as his "primary caregiver" in Baptist Health hospital records from October 19, 2005. During his final hospital stay at St. Vincent's from October 24 - 28, 2005, Mr. Oliver executed a Healthcare Power of Attorney in favor of Ms. Jackson. Mr. Oliver's friend, Joe Harris, testified that he spoke with Mr. Oliver every day and visited his house sometimes. Mr. Harris testified that Ms. Jackson "pretty much took care of [Mr. Oliver]" like a wife or caretaker and that he considered Ms. Jackson to be Mr. Oliver's girlfriend. He testified that Mr. Oliver spent his holidays with Ms. Jackson and her children.

Ms. Jackson testified that she took Mr. Oliver to the hospital when necessary and on other errands; that she shared a bank account with him at one point; that she would, on occasion, pay bills for him; and that she checked on him regularly. She admitted that Mr. Oliver occasionally gave her money and that he bought a refrigerator for her. She also testified that Mr. Oliver gave his keys and wallet to her when he was in the hospital. Finally, Ms. Jackson said that she ordered the release of Mr. Oliver's body from the hospital to the funeral home and made all of the funeral arrangements.

After a de novo review of the testimony in this case, we hold as a matter of law that a confidential relationship existed between Mr. Oliver and Ms. Jackson, shifting the burden to Ms. Jackson to overcome the rebuttable presumption of undue influence. Accordingly, we hold that the trial court erred in failing to shift the burden of proof to Ms. Jackson to rebut

by a preponderance of the evidence the presumption of undue influence, and we reverse and remand to the trial court to apply the proper burden of proof.

Affirmed in part; reversed and remanded in part.

GRIFFEN and GLOVER, JJ., agree.